IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 20, 2006

CHARLES E. ROBINSON v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Williamson County
No. CR 03132 R.E. Lee Davies, Judge

No. M2005-02027-CCA-R3-PC - Filed December 15, 2006

Petitioner, Charles E. Robinson, appeals the post-conviction court's dismissal of his petition for post-conviction relief. In his appeal, Petitioner argues that his counsel's assistance at trial was ineffective for failing to request the trial court to charge the jury on the lesser included offense of facilitation. After review, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3, Appeal as of Right; Judgment of the Circuit Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID G. HAYES and NORMA MCGEE OGLE, JJ. joined.

Venus Niner, Franklin, Tennessee, for the appellant, Charles E. Robinson.

Paul G. Summers, Attorney General and Reporter; Preston Shipp, Assistant Attorney General, Ronald L. Davis, District Attorney General; and Derek K. Smith, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

Following a jury trial, Petitioner was convicted of the sale of 14.9 grams of cocaine and possession of cocaine. Petitioner was sentenced as a Range II, multiple offender, to consecutive sentences of twelve years for the sale of cocaine conviction, and eleven months, twenty-nine days for the possession conviction. The evidence supporting Defendant's conviction was summarized by a panel of this Court in Petitioner's direct appeal as follows:

> The convictions in this case arose out of a drug transaction between [Petitioner] and Richard Jefferson, a confidential informant. To set up the transaction, Jefferson made three telephone calls to [Petitioner] at home. All three

calls were made from the police station. Only the last phone call, the one in which the actual deal was set up, was recorded.

Under police instruction, Jefferson went to [Petitioner]'s home carrying $1300 in cash to make the buy. Jefferson refused to wear a wire as he was afraid he would be searched. After entering [Petitioner]'s residence, police officers, who remained nearby to observe, watched [Petitioner] leave his home and walk a couple of blocks to an apartment complex parking lot. After conversing with some men who were sitting in a silver automobile, [Petitioner] returned to his house. Within a few minutes, Jefferson came to the unmarked police vehicle and handed the officer a plastic bag containing a white powder which later proved to be cocaine.

The officers obtained a warrant and returned to search [Petitioner]'s house. [Petitioner] directed the officers to an upper shelf in a kitchen cupboard where they found a plastic bag containing .6 gram of cocaine. On [Petitioner]'s person, the officers found $383 in cash, $200 of which were bills provided by the officers to the informant.

State v. Charles E. Robinson, No. 01C01-9404-CC-00123, 1995 WL 353528, *1 (Tenn. Crim. App., at Nashville, June 14, 1995), *perm. to appeal denied* (Tenn. Sept. 20, 1999).

II. Post-Conviction Hearing

Petitioner's trial counsel testified that Petitioner's theory of defense at trial was based first on an entrapment defense, and, in the alternative, that the transaction at issue was a casual exchange. Counsel said that Petitioner presented evidence that he and the confidential informant were friends, and that Mr. Jefferson asked Petitioner to procure him some cocaine in Petitioner's capacity as Mr. Jefferson's friend. Petitioner believed the drugs he provided Mr. Jefferson were for his personal consumption, not resale. Counsel stated that the trial court instructed the jury on both the theory of entrapment and the offense of a casual exchange of drugs.

Counsel said that he considered requesting an instruction on facilitation, but he did not believe an instruction on facilitation was appropriate because Petitioner received $200 as remuneration for selling the cocaine to Mr. Jefferson, and because Petitioner was charged as a principal in the commission of the offense, and not under a theory of criminal responsibility.

III. Standard of Review

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, he must establish that counsel's performance fell below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). In addition, he must show that counsel's ineffective performance actually adversely impacted his defense. *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674

(1984). In reviewing counsel's performance, the distortions of hindsight must be avoided, and this Court will not second-guess counsel's decisions regarding trial strategies and tactics. *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). The reviewing court, therefore, should not conclude that a particular act or omission by counsel is unreasonable merely because the strategy was unsuccessful. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. Rather, counsel's alleged errors should be judged from counsel's perspective at the point of time they were made in light of all the facts and circumstances at that time. *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066.

A petitioner must satisfy both prongs of the *Strickland* test before he or she may prevail on a claim of ineffective assistance of counsel. *See Henley v. State*, 960 S.W.2d 572, 580 (Tenn. 1997). That is, a petitioner must not only show that his counsel's performance fell below acceptable standards, but that such performance was prejudicial to the petitioner. *Id.* Failure to satisfy either prong will result in the denial of relief. *Id.* Accordingly, this Court need not address one of the components if the petitioner fails to establish the other. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069.

IV. Ineffective Assistance of Counsel

Petitioner argues that his trial counsel's assistance at trial was ineffective because he failed to request the trial court to instruct the jury on facilitation as a lesser included offense of the sale of cocaine.

Evaluating Petitioner's claim under the standards applicable at the time of Petitioner's trial, "virtually every time one is charged with a felony by way of *criminal responsibility* for the conduct of another, *facilitation* of the felony would be a lesser included offense." *State v. Lewis*, 919 S.W.2d 62 (Tenn. Crim. App. 1995), *overruled on other grounds State v. Williams*, 977 S.W.2d 101, 106 n.6 (Tenn. 1998) (emphasis in original). Petitioner, however, was charged as a principal in the sale of cocaine to Mr. Jefferson. Petitioner did not dispute at trial that he received money as a result of the sale. Trial counsel testified at the post-conviction hearing that based on these facts he presented an affirmative defense based on entrapment, and, alternatively, argued that the exchange was a casual exchange between friends. Petitioner submits new theories of defense in his brief in the case *sub judice* which appear to rely primarily on a contention that he was acting as Mr. Jefferson's agent and not as a principal during the commission of the offense. However, based on the theory of defense and evidence presented at trial, we conclude that counsel's tactical decision to not request a facilitation instruction was reasonable.

Moreover, at the time of Petitioner's trial, it was "the trial court's duty to charge juries as to the law of each offense included in an indictment . . . whether or not a defendant requests such an instruction." *State v. Wilson*, 92 S.W.3d 391, 394 (Tenn. 2002) (citing T.C.A. § 40-18-110(c) (1997)); *see also State v. Page*, 184 S.W.3d 223, 229 (Tenn. 2006) (Holding that "[u]nder this prior version of section 40-18-110, a defendant was not required to request a lesser-included instruction to assign as error the trial court's failure to give such instruction). Based on the trial court's duty to instruct the jury regardless of a request to do so from the defendant, this Court has previously

concluded that defense counsel was not ineffective for failing to request an instruction on a particular lesser included offense. *See Chivous Robinson v. State*, No. E2005-010E6-CCA-R3-PC, 2006 WL 1381511 (Tenn. Crim. App., at Knoxville, May 19, 2006), *perm. to appeal denied* (Tenn. Oct. 2, 2006); *Jeffery Lee Miller v. State*, No. M2003-02841-CCA-R3-PC (Tenn. Crim. App., at Knoxville, Apr. 19, 2005), *perm. to appeal denied* (Tenn. Oct. 17, 2005); *Terrance L. Turner v. State*, No. M2002-02429-CCA-R3-PC (Tenn. Crim. App., at Nashville, Mar. 25, 2004), *perm. to appeal denied* (Tenn. Aug. 30, 2004). Accordingly, we conclude in the case before us that trial counsel was not ineffective for failing to request an instruction on the lesser included offenses of facilitation of the sale or delivery of cocaine because this obligation at the time of Petitioner's trial was statutorily imposed upon the trial court. Petitioner did not argue at the post-conviction hearing or in this appeal that his counsel rendered ineffective assistance by failing to raise the lesser included issue on appeal. *See Chivous Robinson*, 2006 WL 1381511, at *6. Thus, Petitioner is not entitled to relief on this issue.

CONCLUSION

After review, we affirm the judgment of the post-conviction court.

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THOMAS T. WOODALL, JUDGE